NO. 21711

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN L. BATTAGLIA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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United States Attorney,
DAVID R. NISSEN,
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I

STATEMENT OF THE PLEADINGS DISCLOSING JURISDICTION

On August 19, 1964, the Appellant was convicted in the United States District Court for the Southern District of California on six counts of an indictment charging the willful transmission of telephone calls for the purpose of executing a scheme to defraud, in violation of 18 United States Code §1343. The Honorable Roger D. Foley, United States District Judge for the District of Nevada, presided at his jury trial. Upon direct appeal to this Court, the conviction as to Counts One and Two of the indictment was affirmed on July 12, 1965. Battaglia v. United States, 349 F. 2d 556. A

petition for a writ of certiorari was denied by the United States Supreme Court on December 13, 1965. 382 U.S. 955. On March 3, 1966, Judge Foley modified the sentence of Appellant to provide for consecutive five year terms of imprisonment on each of Counts One and Two, with eligibility for parole on Count Two to be determined according to the terms of 18 United States Code §4208(a)(2).

On July 15, 1966, the Appellant filed a Motion to Vacate his Conviction, pursuant to 28 United States Code §2255, alleging that he was mentally incompetent to understand the proceedings against him at trial, and that he was denied the effective assistance of counsel during the proceedings against him [C. T. 2]. 1/ A full hearing on the motion, at which the Appellant was present and represented by counsel, was held before Judge Foley on September 20 and 21, 1966. On October 3, 1966, Judge Foley entered Findings of Fact, Conclusions of Law and Judgment denying Appellant's motion [C. T. 17]. On November 15, 1966, Appellant filed a Notice of Appeal from the Order entered by Judge Foley [C. T. 21].

On December 20, 1966, Appellant filed a Motion for New Trial, pursuant to Rule 60(b), Federal Rules of Civil Procedure, seeking a new hearing on his Motion to Vacate the Conviction on the grounds of improper conduct of the trial judge, as well as insufficiency of the evidence to sustain the judgment. At this time, Appellant also filed an affidavit of bias and prejudice against Judge Roger D. Foley [C. T., Supplemental Record on Appeal]. On

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1/ "C. T." refers to Clerk's Transcript of Record on Appeal.

January 18, 1967, Judge Foley entered an order assigning the case to Chief Judge Thurmond Clarke for all further proceedings, who in turn transferred the matter to Judge Leon R. Yankwich.

Meanwhile, Appellant had made several efforts to obtain his release on bail pending this appeal and the hearing of the Motion for New Trial. A Motion for Bond Pending Appeal, filed November 15, 1966, was denied by Judge Foley on November 28, 1966. On December 21, 1966, Appellant filed a Motion for bail pending hearing of his Motion for New Trial.

Appellant's Motion for New Trial and for bail pending hearing of the motion were heard by Judge Yankwich on January 23, 1967. Both were denied in an order entered January 25, 1967.

On February 14, 1967, Appellant filed in this Court an application for bail pending appeal, as well as a Motion for leave to file a Petition for a Writ of Mandamus. Both were denied by this Court in an order entered May 9, 1967 [Misc. No. 3208]. A Motion for Reconsideration was similarly denied on August 17, 1967. On September 7, 1967, Appellant's application to Mr. Justice Douglas for bail pending this appeal was denied.

An understanding of these proceedings is aided by a brief account of the proceedings in a companion case, Case No. 66-2078-Y in the Court below. On December 28, 1966, Appellant filed a Petition for a Writ of Habeas Corpus, raising the same issues that were raised in his Motion to Vacate under 28 United States Code §2255, and are being raised on this appeal. An application for bail pending hearing on the Petition for Writ of

Habeas Corpus was granted on December 28, 1966 by Chief Judge Thurmond Clarke, who vacated his order on the same day. On January 16, 1967, Judge Leon R. Yankwich entered an order denying the Petition. Appellant's efforts to appeal from this denial were thwarted on February 14, 1967, by the refusal of Judge Yankwich to issue a Certificate of Probable Cause pursuant to 28 United States Code §2253. Judge Yankwich's Order was upheld by this Court on April 26, 1967 [Misc. No. 3272].

The jurisdiction of the District Court to entertain Appellant's Motion to Vacate was founded upon §2255, Title 28, United States Code. The jurisdiction of this Court over the appeal is based upon §§ 1291 and 1294(1), Title 28, United States Code.

II

STATUTES INVOLVED

Title 28, United States Code, §144 provides as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists,

and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Title 28, United States Code, §2255 provides as follows:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues

and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant

has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

III

STATEMENT OF FACTS

By an order entered after a pre-trial conference conducted by Judge Foley on August 26, 1966, it was stipulated that evidence offered at the hearing on Appellant's Motion to Vacate his Conviction would be limited to five issues of fact:

(1) Was the petitioner adequately represented by competent counsel in the criminal proceedings?

(2) Was there any knowing use of perjured testimony or suppression of evidence by the prosecutor in the criminal proceedings?

(3) Was petitioner mentally competent, i.e., able to understand the nature of the proceedings against him and to cooperate with counsel in his defense at all stages of the criminal proceeding?

(4) Is Petitioner likewise competent at all stages of this civil proceeding?

(5) Is Petitioner adequately represented by competent counsel in this civil proceeding?

At the hearing held before Judge Foley on September 20-21, 1966, the Appellant offered evidence on issues of fact Numbered 1 and 3 [C. T. 19].

Appellant's contention that he was mentally incompetent to understand the proceedings against him and to cooperate with counsel in his defense was primarily based upon his own testimony that he consumed a large quantity of drugs during the course of the trial proceedings. Each of these drugs will be considered separately.

The Appellant testified that during the trial period, extending from August 10th through August 19th, 1964, he would generally take two or three capsules of Nembutol at night [R. T. 192]. 2/ Dr. Maurice W. Rosenberg, the doctor who prescribed this drug for the Appellant, described it as a hypnotic barbituate, for the purpose of inducing sleep [R. T. 110]. It was prescribed in the "average" dose [R. T. 111], and the doctor stated that "most people take it two at a time" [R. T. 112]. Dr. Rosenberg's prescription was offered into evidence [R. T. 64], and it contained the directions: "One when needed for sleep" [R. T. 81].

Appellant testified that he would take seven or eight Fiorinal tablets each day during the trial [R. T. 193]. Fiorinal was described by Dr. Rosenberg as "a prescription similar to Anacin plus some barbiturates",which is used for headaches [R. T. 121]. The directions contained on the prescription No. 75706,

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2/ "R. T." refers to Reporter's Transcript.

offered in evidence, were "one every four hours when needed for headache" [R. T. 71, 81]. In his testimony, however, Dr. Rosenberg stated that two every four hours would be the usual average, not a strong dose [R. T. 130].

Appellant stated that during the latter part of the trial period, he took two and a half or three Dexamil each day, his intake being less than this during the early part of the trial [R. T. 194]. Dr. Rosenberg described Dexamil as a stimulant, "made out of a compound called amphetamine, which is similar to caffiene. It tends to make you more active, more wide awake" [R. T. 113]. There were two prescriptions for Dexamil offered in evidence, No. 70614 [R. T. 65] and No. 74315 [R. T. 69]. The directions on both of these prescriptions were "as directed" [R. T. 81].

Appellant also testified that, upon arising each morning of the trial, he would take one Darvon to counteract the effects of the Nembutol he had taken the night before [R. T. 195-196]. Darvon was described by Dr. Rosenberg as a non-narcotic analgesic, used to relieve pain [R. T. 121]. One prescription for this drug was offered in evidence [R. T. 72]. It contained the directions "One every four hours when needed for pain" [R. T. 82].

Finally, the Appellant testified that he consumed four to seven swallows of Phenergan each day of the trial [R. T. 196]. Dr. Rosenberg characterized Phenergan as a liquid cough medicine containing antihistamine [R. T. 108], which was prescribed to counteract "the symptoms of a cold, which is a runny nose" [R. T. 109]. The prescription for Phenergan which was offered in

evidence [R. T. 62] contained the directions "one teaspoon every four hours for cough" [R. T. 81].

Although a number of other prescriptions were offered into evidence [R. T. 54-77], they covered a period of several years, and the Appellant himself testified that the five drugs mentioned above were the only ones he was taking during the period of the trial proceedings [R. T. 196].

Dr. Rosenberg testified that he had served as Appellant's physician from December, 1952 until February, 1963 [R. T. 101-102]. The circumstances under which the prescriptions in question were issued to the Appellant were described by Dr. Rosenberg as follows:

> "Q. From time to time in the past whenever you would see him would he suggest to you various medications that he wanted to try?
>
> "A. Well, I will take a look. I don't recall, but most of these medications he has gotten recently have been on his own suggestion.
>
> "Q. Well, how recently are we talking about?
>
> "A. The prescriptions that you gave me here, from March '63 on down [R. T. 119].
>
> "Q. Would it be a fair statement to say that you received a phone call from Mr. Battaglia or a pharmacist and said: I would like to try this or that particular medication?
>
> "A. If I thought it would benefit him or it

wouldn't do him any harm. I wouldn't object to prescribing it for him." [R. T. 120].

The doctor further testified that he was not concerned about the number of times the Appellant was securing refills of these prescriptions, because:

> "I didn't think he was taking an excessive amount because Nembutol, many people, as I say, have to take as many as four, many people take two Seconals and two Nembutols to sleep. As you use these things you become more and more resistant to their effects. The things like Fiorinal or Librium, or even Declo -- the amphetamines, the Darvon, of course, he can take all he wants, there is no harmful effect." [R. T. 131-132].

None of the drugs prescribed by Dr. Rosenberg could be classified as narcotics [R. T. 138]. According to his testimony, one was a stimulant and the other a sleeping pill, and if taken as prescribed they would have no effect on the Appellant's mental condition during the hours of trial [R. T. 136]. Indeed, the doctor testified that if one took the drugs described in the amount which the appellant testified he took them, he would be alert [R. T. 238-239].

Appellant contended below, however, that two extraneous factors contributed to the effects these drugs had upon his mental condition: a liver condition, and the amount of alcohol he was consuming. Dr. Howard Bowman testified that he first examined the Appellant on April 6, 1965 [R. T. 7]; that on subsequent examinations he arrived at a diagnosis of portal cirrhosis of the liver [R. T. 13]. In Dr. Bowman's opinion, this condition could have existed for several years prior to his diagnosis [R. T. 15], but he was unable to state whether the disease was in a period of relapse or remission during the trial period of August, 1964, one year prior to his diagnosis [R. T. 17-18]. Dr. Bowman further stated that a substantial intake of barbiturates by a cirrhotic could increase the symptoms of cirrhosis [R. T. 19-20], which include apathy, fatigue, somnolence, forgetfulness and confusion [R. T. 14]. Dr. Rosenberg testified that the knowledge the Appellant suffered from portal cirrhosis would not have deterred him from prescribing barbiturates [R. T. 132]. The Appellant testified that he was in the habit of consuming a quart of wine daily with his meals, as well as several martinis and other drinks [R. T. 174]. Indeed, Dr. Bowman attributed his cirrhosis mainly to the ingestion of alcohol [R. T. 15]. However, the Appellant himself testified that during the period of the trial he substantially reduced his alcoholic intake, reducing it to a couple of glasses of wine with his meals [R. T. 197]. Dr. Rosenberg testified at length as to the effect of alcohol on each of the drugs he prescribed for the Appellant. The effect of alcohol on Nembutol, he testified, would depend upon the amount of alcohol

or Nembutol that a person is accustomed to taking [R. T. 126]. The alcohol would cause one to go to sleep faster, but the effect of the drugs would wear off faster than the effects of the alcohol [R. T. 128-129]. Regarding Fiorinal, Dr. Rosenberg stated "if you had a headache to begin with and took a lot of Fiorinal and then drank some alcohol on top of it, which seems rather silly, but I suppose a person could, I think they would go to sleep" [R. T. 130]. As to Dexamil, the doctor testified that one who took a substantial amount of alcohol after taking a substantial amount of Dexamil "would have difficulty staying on his feet and he probably would annoy people, and things of that sort" [R. T. 128]. Finally, Dr. Rosenberg stated that the cough medicine, Phenergan, contained alcohol, so additional alcohol would not affect it [R. T. 125-126].

The most serious conflict in the testimony, of course, revolved around the effects which the consumption of these drugs, together with alcohol and the liver ailment, had upon the Appellant's mental condition during the trial. Appellant himself testified that, during the month preceding the trial, he was "unable to function mentally" [R. T. 184], and during the trial itself, he could see less clearly and couldn't speak without slurring his words [R. T. 199]. He stated he asked his co-counsel, Mr. Hollopeter, to move for a continuance because he did not feel well [R. T. 188] but was told there had been too many continuances already and another would not be sought [R. T. 200-201]. 3/ Appellant's trial counsel, Harold

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3/ Apparently, no such motion was ever made [R. T. 201-202]. An earlier request for a continuance for Appellant to undergo surgery had been granted [R. T. 175].

A. Abeles, testified he had difficulty conversing with Appellant, that at times Appellant became vague and disjointed [R. T. 24]. Mr. Abeles stated he did not call this to the attention of the Court because he understood his co-counsel, Mr. Hollopeter, who withdrew from the case on the first day of trial, had already called the matter to the Court's attention by means of a motion for a continuance [R. T. 36]. Appellant also offered the testimony of his nephew, Joseph C. Battaglia, who stated he visited his uncle frequently at home during the trial period, and described his uncle's condition during this period as "almost incoherent" [R. T. 150], as well as the testimony of attorney Edward I. Ritz (sic: Gritz) who described an encounter in a hallway during the trial in which he had difficulty explaining an unrelated business transaction to the Appellant [R. T. 159].

In the course of the hearing below, the Appellee offered the testimony of three witnesses who had observed the condition of the Appellant during the course of his trial. Benjamin S. Farber was an Assistant United States Attorney assigned to the trial of the Appellant. He recalled several occasions in the course of the trial when he conversed briefly with the Appellant, and he testified that Appellant was responsive and nothing unusual in his demeanor was noticed [R. T. 242, 244]. During the trial itself, he observed Appellant watching the jury during the testimony of witnesses, grimacing at the testimony of one particular witness [R. T. 243]. John A. Mitchell was also an Assistant United States Attorney assigned to Appellant's trial. He recalled conversing with

Appellant twice during the course of the trial. First, a discussion about Saratoga, New York, in a hallway during a recess [R. T. 250-256], and second, a meeting in the prosecutor's office where certain tapes to be used in evidence were played for Mr. Battaglia and his attorney [R. T. 250-257]. On both occasions, the Appellant appeared to be coherent and was able to follow the conversation [R. T. 250]. In fact, on the second occasion, when listening to the tapes, the Appellant would make joking remarks responsive to crucial points in the tapes [R. T. 261]. Finally, Special Agent Woodrow R. McCully of the Federal Bureau of Investigation, who was present during the Appellant's trial, testified that he conversed with Mr. Battaglia at least twice each day and on every occasion Appellant responded directly to his statements and questions [R. T. 263-264].

Appellant did not testify at his trial. At the hearing below, he testified that he at all times expected to be called as a witness on his own behalf, but was never called [R. T 216-217]. His trial attorney testified that the matter was discussed with appellant, and the decision not to call the appellant to the witness stand was partially influenced by his physical condition [R. T. 27, 33] although other factors affected the decision, including the prospect of impeachment by prior convictions [R. T 37-38]. In this connection, John A. Mitchell testified that the Appellant had testified at a hearing regarding reduction of bail on November 15, 1963, at which time he understood the questions asked and responded appropriately [R. T. 251, 253-254].

At the conclusion of all of the evidence, Judge Foley found that the Appellant had failed to sustain his burden of proof upon each of the factual allegations of the Motion [R. T. 299, 300]. Formal Findings of Fact and Conclusions of Law were entered and filed one week later [C. T. 17].

IV

SPECIFICATION OF ERRORS

Three questions emerge from the argument presented in appellant's opening brief:

(1) Did the Appellant sustain his burden of proving that he was not mentally competent at all stages of the criminal proceeding?

(2) Did the Appellant sustain his burden of proving he was not adequately represented by competent counsel in the criminal proceedings?

(3) Was the Appellant denied a fair hearing by prejudicial misconduct of the trial judge?

V

ARGUMENT

A. THE APPELLANT DID NOT SUSTAIN HIS BURDEN OF PROVING THAT HE WAS NOT MENTALLY COMPETENT AT ALL STAGES OF THE CRIMINAL PROCEEDING.

The standard to be applied in determining the mental competency of an individual to stand trial is that set forth by the Supreme Court in its per curiam decision of Dusky v. United States, 362 U.S. 402 (1960):

> "The test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him."

Where the question of competency to stand trial is raised on a motion to vacate a conviction under 28 U.S.C. §2255, after the trial proceedings have been completed, the burden falls upon the petitioner to establish that he was incompetent to stand trial. As stated by Judge Holtzoff of the United States District Court for the District of Columbia:

> "Obviously, the burden of proof on a motion to vacate a sentence under 28 U.S.C. §2255 is on the moving party, because there is a presumption

of regularity of the conviction. The burden is particularly heavy if the issue is one of fact and a long time has elapsed since the trial of the case."

United States v. Bostic, 206 F. Supp. 855, 856-57 (1962), affirmed 317 F. 2d 143 (D.C. Cir. 1963); Accord: Ingling v. United States, 303 F. 2d 302, 304 (9th Cir. 1962); United States v. Tom, 340 F. 2d 127, 128 (2nd Cir. 1965); Johnston v. United States, 292 F. 2d 51 (10th Cir.), cert. denied 368 U.S. 906 (1961).

To sustain his burden of proving his incompetence, the Appellant had to prove more than the mere fact that he was taking drugs at the time of trial. Even the use of narcotic drugs does not per se render a defendant incompetent to stand trial. United States v. Tom, supra. Incompetency turns upon the degree to which the drugs affect the rational processes of the defendant, hence his ability to consult with counsel and understand the proceedings against him. In making this determination, the courts have generally given great weight to three factors:

(1) Whether the defendant's stream of speech is clear, coherent and adequate to communicate with his counsel;

(2) The defendant's memory for the events concerning the offense with which he is charged;

(3) The defendant's memory of the events surrounding the trial itself.

See Johnson v. Settle, 184 F. Supp. 103, 106 (W.D. Mo.

1960); United States v. Burdette, 161 F. Supp. 326 (E.D. Mich. 1957), affirmed 254 F.2d 610 (6th Cir. 1958), cert. denied 359 U.S. 976.

In considering these factors, it is apparent, first, that there was a serious conflict in testimony as to whether the Appellant's stream of speech was clear and coherent. In ruling on this matter, the trial judge clearly indicated that he chose not to believe the Appellant, his nephew, or Mr. Abeles [R.T. 298, 299]. In a collateral attack upon a judgment, as in other proceedings, credibility of the witnesses is for the trier of facts to decide, even with respect to testimony not formally contradicted. Hawk v. Olson, 326 U.S. 271, 279 (1945); Smith v. United States, 339 F.2d 519, 526 (8th Cir. 1964).

Secondly, the Appellant offered no evidence that his memory of the events concerning the offense was in any way impaired. The only description of pre-trial consultations was that offered by Mr. Abeles, Appellant's trial counsel:

> "A. I was trying to elicit all of the facts of the case and the problem was that I had difficulty obtaining them from him, and mostly it was he was somewhat vague and indicated to me that they would be revealed to me in due time.
>
> "Q. Mr. Abeles, did you find Mr. Battaglia deliberately vague?
>
> "A. I couldn't say. I really don't, I don't, -- I don't know." [R.T. 31-32].

Finally, the Appellant's memory of the events surrounding the trial itself showed a keen awareness of what was transpiring. He remembered how he came to court in the morning, and how he returned home each evening [R. T. 206]. He recalled specific conversations with Agent McCully and the Assistant United States Attorneys [R. T. 207-208]. He remembered conferences with his attorneys, in many instances relating the conversations occurring during these conferences word for word [R. T. 187-198; 200-201; 203-205; 213; 216-218]. He related the names of visitors to his home during the trial period [R. T. 208-209] as well as the business transactions he was engaged in during this period [R. T. 209-211]. Finally, of course, the Appellant recited a detailed schedule of the drugs he was taking, when he took them, and the amount of alcoholic beverages he consumed [R. T. 192-196]. Appellant's testimony at the hearing offered no substantiation of his claim he had "but scant memory of the actual trial proceedings" [C. T. 8]. To the contrary, he displayed a convenient memory, anxious to provide only the alleged details which would advance his claim of incompetency.

On this record, it is clear that there was more than sufficient evidence to sustain the trial court's conclusion that Appellant was mentally competent at all stages of the criminal proceedings. Compare United States v. Tom, 340 F. 2d 127 (2nd Cir. 1965).

B. THE APPELLANT DID NOT SUSTAIN HIS BURDEN OF PROVING THAT HE WAS NOT ADEQUATELY REPRESENTED BY COMPETENT COUNSEL IN THE CRIMINAL PROCEEDINGS.

The Appellant's contention below that he was not adequately represented by competent counsel at trial related only to the conduct of Mr. Abeles, in failing to call to the attention of the trial court that Appellant was unable to communicate with him and assist him in the trial [R. T. 266-268]. It was not contended below, nor is it contended on appeal, that Appellant was in any way prejudiced by any conduct of Mr. Hollopeter, or by the substitution of attorneys occurring on the first day of trial.

In light of the court's disposition of Appellant's contention that he was mentally incompetent to stand trial, any other disposition of Appellant's argument as to adequate representation of counsel would have been inconsistent. As stated by the trial judge:

> "If he was competent, as Mr. Lally has argued, then he was able to assist his counsel and he could have taken the stand if such had been the decision. So his argument that he was deprived of his right to testify and that he was deprived of a fair trial by virtue of his inability to assist his counsel all are based on the contention he was incompetent at the time of trial, and I just don't feel from the record in this case alone, without looking at the criminal proceedings, that petitioner has met the burden of

proof." [R. T. 300].

This Court has repeatedly held that the standard to be applied in evaluating the adequacy of trial counsel is that the counsel's performance must be so incompetent as to make the trial "a farce or a mockery of justice". Rivera v. United States, 318 F. 2d 606, 608 (9th Cir. 1963) and cases cited therein.

Far from Appellant's trial being a farce, the trial judge found that Mr. Abeles "ably represented the defendant in the criminal proceedings. I think he is an accomplished and skillful trial lawyer." [R. T. 299].

As to the decision not to call the Appellant as a witness at his trial, the court below refused to believe that this decision was based upon any mental incompetence on the Appellant's part [R. T. 286-287]. To the contrary, in light of the other factors considered [R. T. 37-38], it appears to have been "an example of good trial tactics by an attorney versed in the criminal law". Hudgins v. United States, 340 F. 2d 391 (3rd Cir. 1965).

C. THE APPELLANT WAS NOT DENIED A FAIR HEARING BY PREJUDICIAL MISCONDUCT OF THE TRIAL JUDGE.

During the course of the hearing on Appellant's motion, Judge Foley on numerous occasions referred to his recollection of the trial proceedings [R. T. 29; 267; 276-277; 286-287]. In alleging that Judge Foley was biased, Appellant seizes upon two of

these instances. First, in discussing the credibility of Mr. Abeles, Judge Foley referred to an incident in which this attorney had misquoted him in presenting to the Court of Appeals what had occurred during a conference in chambers [R. T. 276-79]. Secondly, in passing upon the credibility of the Appellant himself, the judge referred to information that had been contained in the pre-sentence report submitted prior to Appellant's sentencing [R. T. 298].

Although he would have been fully warranted in doing so, Judge Foley did not consider the incident described above in passing upon the credibility of Mr. Abeles. On three occasions, he stated that he found the testimony of Mr. Abeles questionable quite apart from this incident [R. T. 280; 286; 301]. Judge Foley rejected Mr. Abeles' testimony on the basis of its inherent improbability [R. T. 286-87; 299]. It has long been held that the trier of fact need not accept even uncontradicted testimony if it is inherently incredible. Quock Tring v. United States, 140 U.S. 417, 420-21 (1891); Factor v. C.I.R., 281 F. 2d 100, 111 (9th Cir. 1960), cert. denied, 364 U.S. 933; Wong Ken Foon v. Brownell, 218 F. 2d 444, 446 (9th Cir. 1955).

As to the reference to the pre-sentence report, Appellant's characterization of this document as a "secret police report" [Appellant's Opening Brief, pp. 7, 8, 13] is somewhat misleading. The pre-sentence report is submitted to the Court pursuant to Rule 32, Federal Rules of Criminal Procedure. As such, it is part of the files and records of Appellant's trial, although its disclosure is subject to the limitations of Rule 32(c).

Appellant's contention that Judge Foley should not have presided over his motion to vacate his conviction ignores one of the basic reasons §2255 of the judicial code was enacted. As stated in Carvell v. United States, 173 F. 2d 348, 348-349 (4th Cir. 1949):

> "Complaint is made that the judge who tried the case passed upon the motion. Not only was there no impropriety in this, but it is highly desirable in such cases that the motions be passed on by the judge who is familiar with the facts and circumstances surrounding the trial, and is consequently not likely to be misled by false allegations as to what occurred. It was to avoid the unseemly practice of having attacks upon the regularity of trials made before another judge through resort to habeas corpus that Section 2255 of Title 28 was inserted in the Judicial Code."

Accord: United States v. Smith, 337 F. 2d 49 (4th Cir. 1964), cert. denied 381 U. S. 916; Dillon v. United States, 307 F. 2d 445, 453 (9th Cir. 1962) (Barnes, C. J., dissenting). In Smith v. United States, 259 F. 2d 125, 126 (9th Cir. 1958), this Court noted the propriety of a trial court considering its own recollection of what transpired at the trial in passing upon a subsequent motion to vacate on grounds of inadequate representation by counsel. See also Scherk v. United States, 242 F. Supp. 445, 450 (N. D. Calif. 1965).

Appellant also refers to Judge Foley's observation that

"there is a faint possibility here that this whole thing is an after-thought" [R. T. 280] as further evidencing his bias and prejudice. This argument is reminiscent of Reiff v. United States, 299 F. 2d 366, 367 (9th Cir. 1962), cert. denied 372 U. S. 937, wherein the appellant asserted that because the trial judge denominated certain paragraphs of his Section 2255 petition as "scurrilous", the motion had been "pre-judged". This Court held: "There is no basis in logic or law for such conclusion, nor is there any error in the court's ruling".

Finally, Appellant urges that Judge Foley's subsequent disqualification upon the filing of an affidavit pursuant to Title 28, United States Code, Section 144 is "final and absolute proof" of his bias and prejudice [Appellant's Opening Brief, p. 17]. It is unnecessary to look beyond Section 144 itself to deal with this argument. The statute provides that once an affidavit of bias or prejudice is filed, "such judge shall proceed no further therein". Although the challenged judge can pass on the sufficiency of the allegations, he must accept the facts alleged as true. Berger v. United States, 255 U. S. 22 (1921); Willenbring v. United States, 306 F. 2d 944 (9th Cir. 1962). Thus, Judge Foley's disqualification is not an admission that he was biased or prejudiced against the Appellant during the hearing.

VI

CONCLUSION

A review of the record revealing more than sufficient evidence to sustain the findings of fact by the trial judge below, and no prejudicial misconduct by the trial judge appearing from the record, the appellee respectfully prays that the judgment of the court below be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gerald F. Uelmen

GERALD F. UELMEN